

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

76-1211

To be submitted.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO.
76-1211

UNITED STATES OF AMERICA,

Appellee,

-against-

IRVING BIRNBAUM,

Appellant.

B
PJS

APPELLANT'S BRIEF



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UNITED STATES OF AMERICA,

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IRVING BIRNBAUM,

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BRIEF ON BEHALF OF APPELLANT

PRELIMINARY STATEMENT

Irving Birnbaum appeals from the denial of a motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure, for a reduction or modification of the sentence interposed on his conviction, together with numerous other defendants of conspiracy to violate the Federal Narcotics Laws, 21 U.S.C. 173, 174; 26 U.S.C. 470.5(a), 7237(b).

Defendant-appellant was sentenced to imprisonment for the term of five (5) years.

On November 21st, 1975, application was made to the Honorable Milton Pollack, Judge of the District Court of the United States for the Southern District of New York, for a reduction or modification of the sentence. In the alternative, two (2) separate requests were made; first: a reduction of the sentence to a period of time less than five (5) years; second: a modification of the five (5) year sentence theretofore interposed by a resentence pursuant to Section 4208(a)(2). The motion was denied on November 21st, 1975 and entered in the Office of the Clerk of the District Court on November 23rd, 1975.

Other sentenced defendants have received the modification of the sentence in accordance with Section 4208(a)(2).

QUESTIONS PRESENTED FOR REVIEW

1. Was the denial of the application to reduce the sentence improper?
2. Should the Court have resentenced the defendant-appellant pursuant to Section 4208(a)(2)?

A R G U M E N T

POINT I

THE DENIAL OF THE APPELLANT'S MOTION SHOULD
BE REVERSED AND HIS SENTENCE MODIFIED IN
ACCORDANCE WITH THE REQUEST.

The sentencing Court has the power to modify the sentence of the appellant in accordance with his request to a term less than the five (5) year sentence imposed by the Statute.

The application was commenced within sixty (60) days of the date of the last previous appellate determination which was on petitioner's application for certiorari to the Supreme Court of the United States individually under petition no. 74-6411 and jointly under petition no. 74-1445, which were both denied on November 11th, 1975, within sixty (60) days of the application, the denial of which is the foundation for this appeal.

Subsequent to the indictment of the defendant-appellant, the Statute was changed so that thereupon became permissible to sentence a defendant in a narcotic case to period of time of less than five (5) years. The sentence imposed by the Statute in effect at the time of the indictment provided for a minimum of five (5) year sentence.

Sufficient grounds were supplied to the Court to mitigate the punishment and justify a reduced sentence. During the period of two and one-half (2-1/2) years from the arrest until the date of the sentence, the defendant-appellant began and operated a trucking company in his own name, had supported himself and had contributed to the support of his ailing mother. The defendant-appellant during that period of time had rehabilitated himself and was planning to marry.

POINT II

THE COURT SHOULD HAVE RESENTENCED
DEFENDANT-APPELLANT PURSUANT TO
SECTION 4208(a)(2).

The Court should have resentenced the defendant-appellant pursuant to Section 4208(a)(2), so to enable him to be paroled in the discretion of the Parole Commissioners at any time from the date of his sentence. The Court in refusing to do this unfairly applied the law to one of the defendants when in fact other defendants had received relief requested by appellant herein.

It is not desirable at this time to enter into the record the names of those persons for which such

relief has been granted, but an examination of the records will reveal the validity of this representation.

CONCLUSION

FOR ALL OF THE ABOVE REASONS THE DECISION
DENYING THE APPELLANT'S APPLICATION FOR
RESENTENCE AND/OR MODIFICATION OF SENTENCE
SHOULD BE REVERSED AND THE MATTER REMANDED
TO THE DISTRICT COURT FOR RESENTENCE IN
ACCORDANCE THEREWITH.

Respectfully submitted,

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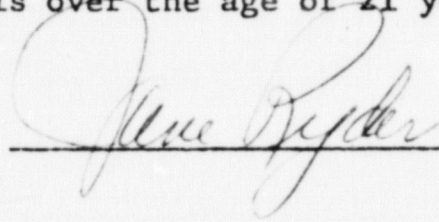
STATE OF NEW YORK)
)
COUNTY OF NASSAU)

§ 53.1

JANE RYDER, being duly sworn, deposes and says:

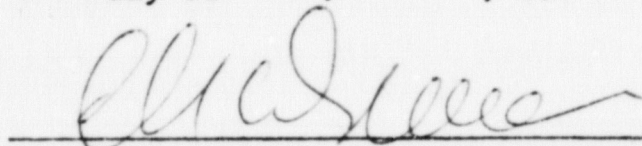
That she is secretary to Morrow D. Mushkin, Esq., the attorney for the above named Appellant herein. That on the 24th day of May, 1976, she served the within Appellant's Appendix in triplicate Brief in triplicate and/ upon Paul J. Curran the attorney(s) for the above named Appellee by depositing a true copy of the same securely enclosed in a post-paid wrapper in the Official Depository maintained and exclusively controlled by the United States at No. 600 Old Country Road, Garden City, New York, directed to said attorney(s) for the Appellee at No. Foley Square, New York New York, that being the address within the State designated by him for that purpose upon the preceding papers in this action, or the place he then kept an office between which places there then was and now is a regular communication by mail.

That your deponent is over the age of 21 years.



SWORN to before me this

24th day of May, 1976



MORROW D. MUSHKIN
Notary Public, State of New York
No. 30-8084100
Qualified in Nassau County
Commission Expires March 30, 1977